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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 673

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Margaret Nugent, plaintiff-appellant in the court below, petitions this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the cause *Margaret Nugent v. Yellow Cab Company*, No. 13329, on November 8, 1961, which affirmed the judgment and orders of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 21, 1960, March 7, 1961, and March 14, 1961.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 295 F. 2d 794, is appended hereto as Appendix A (pages 17 to 21). The District Court rendered no opinion in this case.

Jurisdictional Statement

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment and orders of the United States District Court for the Northern District of Illinois, Eastern Division, were filed and entered on November 8, 1961 (R. 2-3*; Appendices A and B hereto, pages 17 to 22.)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit by writ of certiorari under the provisions of 28 U.S.C. Section 1254(1).

Questions Presented

Rule 60(b) of the Federal Rules provides in part that federal courts "may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence . . . or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

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* "R" refers to the certified transcript of the proceedings in the Court of Appeals filed with this petition. "A" refers to the Appendix to Appellant's brief filed in the Court of Appeals, a copy of which is included in the certified transcript, and nine copies of which have been filed with the Clerk of this Court pursuant to Rule 23(1) of the Rules of this Court.

The questions presented by this petition are:

1. Does the decision of the Court of Appeals, holding that plaintiff's motion for new trial could not be entertained, constitute or sanction such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in view of the following facts:

(a) Plaintiff, after verdict and judgment, presented a written motion to extend the 10-day period established by Rule 59(b) for filing a motion for new trial, to permit the court reporter to complete the preparation of the trial transcript for use by counsel in preparing a motion for new trial.

(b) Defendant's counsel appeared in open court and expressly agreed to the requested enlargement of time.

(c) The trial judge thereupon entered an order extending the time for filing a motion for new trial.

(d) Counsel for plaintiff and the trial judge (and presumably counsel for defendant) inadvertently overlooked the provisions of Rule 6(b) of the Federal Rules providing that the 10-day period for filing motions for new trial may not be extended.

(e) Plaintiff's motion for new trial was filed within the extended time.

(f) After the motion was filed, defendant moved to strike the motion on the technical ground that, although its counsel had agreed to the enlargement of time, the Court was without power to grant the enlargement.

(g) Plaintiff immediately submitted an affidavit of her counsel that they had inadvertently overlooked the

provisions of Rule 6(b), and requested that she be relieved from the judgment by reason of mistake, inadvertence, or excusable neglect, under Rule 60(b).

(h) Defendant was not harmed by the delay in filing the motion for new trial.

(i) If plaintiff's petition for relief under Rule 60(b) is not granted, plaintiff's motion for new trial will have been disposed of on the basis of a technicality and not on the merits.

2. Does the decision of the Court of Appeals, holding that the District Court, having extended the time for filing the motion for new trial, was without power under Rule 60(b) to entertain the motion filed within the extended time, conflict with *Sternstein* v. *"Italia"-Societa, Etc.*, 275 F. 2d 502 (2d Cir. 1960), which holds that, although no extension of time has been ordered, a federal district court has power under Rule 60(b) to entertain a motion for new trial filed after the expiration of the 10-day period?

3. Does Rule 60(b), authorizing relief from final judgments in cases of mistake, inadvertence, excusable neglect or any other reason justifying relief, authorize a federal court to correct the inequity which occurs when a litigant obtains an extension of the 10-day period established by Rule 59(b) for the filing of a motion for new trial, and where the moving party's counsel, the trial judge, and presumably opposing counsel, overlook the provision of Rule 6(b) that the court may not extend the 10-day period established by Rule 59(b)?

4. Where counsel, unaware of the provisions of Rule 6(b) prohibiting extensions of time for serving and filing motions for new trial, moves for an extension of time for serving and filing his client's motion for new trial, and

opposing counsel agrees to the motion, and the district judge grants the motion, is the moving counsel's lack of awareness of Rule 6(b), and his reliance upon the conduct of opposing counsel in agreeing to the order of extension and the conduct of the district judge in entering an order enlarging the time; the kind of "mistake", "inadvertence", "excusable neglect" or "other reason justifying relief" which authorizes relief under Rule 60(b)?

5. Has practice under the Federal Rules of Civil Procedure become so technical and rigid that the courts are powerless to grant equitable relief under Rule 60(b) to consider the merits of a motion for new trial which was served and filed within the time granted by the trial court, and with agreement of opposing counsel, but more than 10 days from judgment, where the trial judge and all counsel overlooked the provision of Rule 6(b) prohibiting enlargement of the 10-day period?

Federal Rules of Civil Procedure Involved

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

Rules 6(b) and 59(b) of the Federal Rules are also involved. They are reproduced in full in Appendix C hereto (page 23).

The Facts

Petitioner Margaret Nugent brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, against respondent Yellow Cab Company to recover damages for injuries sustained by her while she was riding as a passenger in a taxicab owned and operated by defendant. The federal court's jurisdiction was based upon diversity of citizenship of the parties. (28 U.S.C. §1332).

The case was tried before a jury. On April 19, 1961, the jury returned a verdict in favor of Mrs. Nugent in the amount of $12,500. Judgment was entered on the jury's verdict on April 21, 1960. (A. 2.)

On April 28, 1960, within 10 days from the entry of the judgment,* plaintiff's counsel appeared before the trial judge and presented a verified motion for an extension of time within which plaintiff could file her motion for new trial. The extension was requested in order that plaintiff's counsel could have the benefit of the Official Court Reporter's transcript of proceedings, to the end that they could prepare a concise, clear, specific, and complete motion for new trial. (A. 3, 10.)

One of the attorneys for defendant appeared before the trial court when plaintiff's motion was presented on April 28, 1960, and stated to the court that he had no objection to the entry of an order in accordance with plaintiff's request. The trial judge thereupon entered an order extend-

* Rule 59(b) of the Federal Rules of Civil Procedure, which relates to motions for new trial, provides that motions for new trial shall be served not later than 10 days after the entry of the judgment. See Appendix C, below, pages 23 to 24.

ing the time within which plaintiff was permitted to file her motion for new trial to May 31, 1960. (A. 3, 84.)

Thereafter, several additional extensions were granted to plaintiff, for the same reason, and without objection by defendant. The motion for new trial was served and filed September 20, 1960, within the time granted by order of court. (A. 4-6, 84-85.)

On September 26, 1960, defendant presented a motion to strike plaintiff's motion for new trial, on the ground that the court had no jurisdiction to extend the time within which to file a motion for new trial,* and had no jurisdiction to entertain or rule upon a motion for new trial filed after the expiration of 10 days from the date of judgment. (A. 8-9.)

Plaintiff filed an answer to defendant's motion to strike her motion for new trial (A. 9-12), and an alternative petition for relief under Rule 60(b) of the Federal Rules of Civil Procedure (A. 12-14). The petition, which is verified by plaintiff's counsel, states in part the following (A. 13-14):

> 2. In seeking extensions of time within which to file plaintiff's motion for new trial, plaintiff and her counsel did not attempt or intend to prejudice defendant, or to delay the proceedings in this cause. To the contrary, plaintiff and her counsel desired and still desire to have this litigation expedited. Their sole purpose in seeking extensions of time for the filing of the motion for new trial was to have an opportunity to consult the transcript, to the end that they could prepare a clear, concise, complete motion for new trial.

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* Rule 6(b) of the Federal Rules, a rule relating to enlargement of time in general, provides that the court "may not extend the time for taking any action under rules . . . 59(b) . . ." See Appendix C, below, pages 23 to 24.

No prejudice has resulted or will result to defendant by reason of the extensions of time granted to plaintiff for the filing of her motion for new trial.

3. Plaintiff's counsel, through mistake or inadvertence, overlooked and were not aware of that portion of Rule 6 of the Federal Rules of Civil Procedure which provides that the Court may not extend the time for taking any action under Rule 59(b) except to the extent and under the conditions stated in that Rule. The action of defendant's counsel, in agreeing to plaintiff's original motion for extension of time within which to file her motion for new trial, and in not objecting to plaintiff's subsequent motions for extensions, and the action of the Court in granting said motions, served to confirm the oversight of plaintiff's counsel.

4. The interests of justice require that plaintiff be afforded a hearing and ruling upon the merits of her motion for new trial. Rule 60(b) is a remedial provision, which should be liberally construed to the end that controversies will be determined on their merits, and substantial justice accomplished between the parties. No prejudice will result to defendant if this procedure is adopted, and the ends of justice will be served.

Defendant did not respond to plaintiff's petition.

Briefs were filed by the parties, and the matter was taken under advisement by the trial judge. (A. 9, 14-16.) On March 7, 1961, the trial judge entered an order granting defendant's motion to strike plaintiff's motion for new trial, for the reason that the motion was filed beyond 10 days from the date of judgment as required by Rule 59(b). (A. 16-17.) No order was entered with respect to plaintiff's petition for relief under Rule 60(b).

On March 14, 1961, plaintiff moved to vacate the order of March 7. (A. 17.) The trial judge was out of the country, and the motion was heard by another judge of the same court. After hearing argument of counsel, the judge entered an order denying plaintiff's motion to vacate the order of March 7, and denying plaintiff's petition for relief under Rule 60(b). (A. 17.)

Plaintiff appealed from (i) the judgment entered on the jury verdict on April 21, 1960, (ii) the order entered March 7, 1961 striking plaintiff's motion for new trial, and (iii) the order entered March 14, 1961 denying plaintiff's petition for relief under Rule 60(b). (A. 17.)

The Court of Appeals affirmed the judgment and orders appealed from. (See Appendix A and B, pages 17 to 22 below.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW EMASCULATES RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND RADICALLY DEPARTS FROM THE ACCEPTED COURSE OF FEDERAL JUDICIAL PROCEEDINGS.

This case does not involve merely an isolated instance of injustice done a particular litigant. The Seventh Circuit Court of Appeals has now established a pattern of decisions (cf. *Hulson* v. *A., T. & S. F. Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961), cert. denied 82 S. Ct. 61) which stultify the remedial purposes of Rule 60(b), and which are in absolute conflict with the holdings of this Court and of other federal courts.

Rule 60(b) provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . ."

This case has been disposed of, not on the merits, but on the basis of a procedural technicality. Plaintiff's counsel unintentionally and inadvertently failed to comply with a time limitation established by the federal rules.

Plaintiff's counsel did not ignore the 10-day time period established by Rule 59(b); they moved to enlarge the time within the 10 days. The trouble is that nothing in Rule 59(b) suggests that the 10-day period may not be enlarged, and plaintiff's counsel inadvertently overlooked Rule 6(b).

Counsel for the defendant agreed to the requested enlargements of time. Defendant's attorneys were either unaware of Rule 6(b), or else they silently permitted the district court to enter an order which they knew it had no power to enter, and which they later sought to capitalize upon.

Even the experienced district judge forgot the prohibition—tucked away in Rule 6(b)—against extending the time under Rule 59(b).

Neither the Court nor the parties were injured as a result of the orders extending the time.

As soon as defendant's counsel pointed out the defect, plaintiff sought relief under Rule 60(b), asking the district court to relieve plaintiff from the finality of the judgment entered on the jury verdict. The affidavit of plaintiff's attorneys in support of plaintiff's petition (A. 12-14) stands unanswered. That affidavit shows clearly that all that is involved here is a technical trap which plaintiff's counsel fell into through inadvertence, mistake, or—at worst—excusable neglect.

If this situation does not present grounds for relief under Rule 60(b), it is difficult to understand the purpose of those who drafted the rule, and who, to make certain they included every equitable ground for relief, added Subsection (6), which is all-inclusive.

By denying relief in this case, the Court of Appeals for the Seventh Circuit has destroyed the primary purposes of Rule 60(b), namely, to prevent form from overriding substance, to prevent procedural technicalities from controlling the outcome of litigation. This Court, in the exercise of its supervisory powers over the federal courts, should not permit modern federal practice to revert to the kinds of technicalities which were so justly criticized in days gone by, and which make the law appear absurd to the common man.

II.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE STERNSTEIN CASE DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS.

There is a conflict between the decision of the court below and the decision of the Second Circuit Court of Appeals in *Sternstein* v. *"Italia" Societa, Etc.*, 275 F. 2d 502 (2d Cir. 1960). In the *Sternstein* case, an action for personal injuries resulted in a verdict and judgment for the defendant. More than 10 days after the action was dismissed, plaintiff served and filed a motion for new trial. The trial court first granted the motion, then vacated its order on the ground that the motion was "not timely made." (23 F.R.D. 305, S.D. N.Y. 1959.) On appeal, the Second Circuit Court of Appeals held (275 F. 2d at 503):

> "We need not decide whether it was too late to move for a new trial under Rule 59(b), which contains the ten day limitation. It is clear that a motion for a new trial under Rule 60(b) may be made "within a reasonable time," and the delay here was no more than a few days. The trial judge believed the interests of justice required a new trial and the record discloses that there was a proper basis for such belief. Rule 60(b) was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice. As we find no abuse of such discretion, we vacate the order of April 3, 1959 and reinstate the order of January 20, 1959 granting the new trial. Accordingly, the case is remanded."

In *Sternstein*, relief was granted under Rule 60(b) even though the plaintiff had not obtained an order extending the time for filing the motion for new trial. It follows, *a fortiori*, that relief ought to be granted where the moving

litigant obtained, by agreement, an extension of time for filing the motion.*

The decision of the court below also conflicts with *Daulton* v. *Southern Pacific Company*, 228 F. 2d 103 (5th Cir. 1955).

The decision of the Seventh Circuit Court of Appeals is contrary to decisions of this Court interpreting Rule 60(b). For example, in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949), this Court stated the broad remedial application of Rule 60(b) (335 U.S. at pp. 614-615):

> "... In simple English, the language of the 'other reason' clause [Rule 60(b)(6)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Chief Judge Roy M. Shelbourne, sitting in the District Court of Kentucky, was confronted with a problem almost precisely the same as that in the case at bar, in *Whitmore* v. *Glenn*, 114 F. Supp. 784 (W.D. Ky. 1953), reversed on other grounds 222 F. 2d 549 (6th Cir. 1955). The defendant agreed to the entry of an order extending the time within which plaintiff could serve and file a post-trial motion, and the motion was filed within the extended time. Judge Shelbourne held that he could rule upon the merits of the motion because "defendant should be held to have

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* In the Respondent's brief in opposition to the petition for certiorari in the *Hulson* case, the only mention of the *Sternstein* case appears at page 12; it is stated that in *Sternstein*, "a motion for a new trial was made within ten days of the Court's findings of fact in a bench trial." This distinction is grounded upon an immaterial fact, since the 10-day period for filing motions for new trial is computed from "the entry of the judgment" under Rule 59(b). It is therefore immaterial that the motion was made within 10 days after the prevailing party filed his findings of fact and conclusions of law. The opinion of the court below cannot be reconciled with the opinion in the *Sternstein* case.

waived the provision of the rules requiring such a motion to be filed within 10 days of the entry of judgment. . . ." (114 F. Supp. at 785.) See also *Yanaw* v. *Weyerhaeuser Steamship Co.*, 274 F. 2d 274 (9th Cir. 1959), cert. denied 362 U.S. 919.

The equitable doctrines of waiver and estoppel apply where counsel agrees to the entry of an order enlarging his opponent's time, and later takes the position that the court had no authority to enlarge the time. Subsection 6 of Rule 60(b) should be interpreted to include these equitable grounds for relief.

III.

THE INEQUITY PERPETRATED HERE SHOULD BE SOLVED BY ENLIGHTENED CONSTRUCTION OF RULE 60(b), NOT BY AMENDMENT TO OTHER RULES.

The court below mistakenly blamed the Federal Rules for the inequity which occurred in this case and in the *Hulson* case (289 F. 2d 726, cert. denied 82 S. Ct. 61).

The Seventh Circuit Court of Appeals suggested that plaintiff's request for the relief should be directed to the "study groups" now considering revisions to the Federal Rules. No matter what these committees may devise to prevent in the future the injustice worked in the instant case, they cannot foresee all the instances which will arise in which intervention of "mistake, inadvertence . . . excusable neglect . . . or other reason justifying relief . . ." may create a situation which will put a district judge in the unhappy position of having to enforce a technicality, whose non-observance harmed no one, rather than to decide an issue on its merits.

No one can draft a fair set of rules of procedure which does not include a rule, or imply a practice, permitting the court to grant relief when a literal application of the rules would work injustice. It is precisely for this reason that the original drafting committee included Rule 60(b) in the Federal Rules of Civil Procedure. Rule 60(b) is the safety valve which authorizes federal courts to prevent harmless procedural aberrations from controlling the outcome of litigation.

Therefore, the blame for the injustice done here and in the *Hulson* case cannot be shifted to the Federal Rules. The trouble lies with the failure of the Seventh Circuit Court of Appeals to construe the rules in the way the framers intended.

There is something pathetic in the protest of a federal district judge that he would do justice if he could, but that the Federal Rules of Civil Procedure forbid it. (See *Hulson v. A. T. & S. F. Ry. Co.*, 27 F.R.D. 280, 284 (N.D. Ill. 1960).) How preferable it is to follow the interpretation of Rule 60(b) made by this Court in *Klapprott* v. *U.S.*, 335 U.S. 601, and by the other federal courts, referred to above at pages 12 to 14.

The Federal Rules of Civil Procedure, no matter how evolved, no matter how conscientiously and how often revised, will not work justice unless this Court, in the exercise of its duty to supervise the federal courts, continually sees to it that the Rules are not inflexibly and blindly enforced without regard to the equities of the situation. Rule 60(b) is now a dead letter in the Seventh Circuit. It is up to this Court to breathe life back into that rule, and to make it clear that Rule 60(b) should be given the intelligent interpretation and application its framers intended.

Conclusion

Petitioner respectfully asks this Court to issue its writ of certiorari to the Court of Appeals for the Seventh Circuit to review the judgment in this case, and thereafter to remand this case to the district court with directions to grant plaintiff's petition under Rule 60(b) and to consider plaintiff's motion for new trial on the merits.

Respectfully submitted,

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January 22, 1962

APPENDIX A

Opinion of the United States Court Appeals for the Seventh Circuit

November 8, 1961

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is a diversity action brought by plaintiff Margaret Nugent (appellant) to recover damages for injuries sustained by her on March 19, 1958 while she was riding as a passenger in a taxicab owned and operated by defendant Yellow Cab Company (appellee).

Following a trial by jury, a verdict was returned finding the issues in favor of plaintiff and assessing her damages at $12,500. Judgment on the verdict was entered April 21, 1960.

On April 28, 1960, plaintiff moved the trial court to extend the time for the filing of a motion for new trial to May 31, 1960. One of defendant's attorneys was present in court and stated that he had no objection to plaintiff's request and the motion was granted.

On May 31, 1960, plaintiff filed a second motion for an extension of time to file her motion for new trial and the motion was granted, without objection.

On June 14, 1960 and July 14, 1960, plaintiff's third and fourth motions for similar extensions of time to file her motion for a new trial were granted, without objection.

The latter extension was to and including September 20, 1960.

The reason assigned for each of the four extensions of time was that the official court reporter had not yet prepared the trial transcript.

On September 20, 1960, plaintiff filed her fifth motion for an extension of time for the filing of a motion for new trial to which defendant objected in open court. Thereupon, on the same date and within the time previously allowed by the trial court, plaintiff filed her post-trial motions for judgment notwithstanding the verdict and for a new trial.

Thereafter, defendant moved to strike plaintiff's post-trial motions on the ground that they were not filed within 10 days after the verdict was received and judgment entered thereon as required by Rules 50(b)[1] and 59(b), (d) and (e)[2] of the Federal Rules of Civil Procedure, 28 U.S.C.A., and on the further ground that the trial court was without authority to extend the time for taking action.

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[1] Rule 50(b). "* * * Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. * * *"

[2] Rule 59(b). "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

Rule 59(d). "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

Rule 59(e). "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

under Rule 59(b) because of the prohibition set out in Rule 6(b).[3]

Plaintiff then filed her answer to defendant's motion to strike her post-trial motions and an alternative petition for relief under Rule 60(b).[4]

The ground asserted by plaintiff in her alternative petition for relief under Rule 60(b) was that:

> "3. *Plaintiff's counsel*, through mistake or inadvertence, *overlooked and were not aware of that portion of Rule 6* of the Federal Rules of Civil Procedure which provides that the Court may not extend the time for taking any action under Rule 59(b) except to the extent and under the conditions stated in that Rule. * * * *" (Emphasis added.)

The trial court held that it was without authority to rule on plaintiff's post-trial motions because they were not filed within the 10 days required by Rules 50(b) and 59(b), (d) and (e), and granted defendant's motion to strike. Subsequently, the trial court denied plaintiff's alternative petition for relief under Rule 60(b).

No ruling was made on the merits of plaintiff's motion for a new trial which complains of the inadequacy of the award of damages.

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[3] Rule 6(b). "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged * * * or (2) * * * permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules * * * 50(b), * * * 59(b), (d) and (e), * * * except to the extent and under the conditions stated in them."

[4] Rule 60(b). "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Plaintiff has appealed from the judgment entered on the jury verdict, from the order striking her motion for a new trial and from the order denying her alternative petition for relief under Rule 60(b).

Plaintiff's counsel, with commendable candor, concede that our recent holding in *Hulson* v. *Atchison, T. & S. F. Ry. Co.*, 7 Cir., 1961, 289 F. 2d 726, certiorari denied, October 9, 1961, 82 S. Ct. 61, is dispositive of this appeal. They contend, however, that our holding in *Hulson* is incorrect and argue for a reversal of it.

On the facts, the procedural situation in *Hulson* is almost identical with the case at bar. There we considered at some length the rules under scrutiny here and the authorities bearing upon them. In *Hulson*, we expressly held:

(1) That Rule 50(b) forbids the entry of a judgment n.o.v. on a motion not filed within 10 days after reception of the verdict.

(2) That Rule 59(b), (d) and (e) prohibits a trial court from granting a motion for a new trial made after the expiration of 10 days after entry of judgment.

(3) That, with certain exceptions having no application there, the 10-day period for filing a motion for new trial under Rule 59(b) cannot be enlarged by the trial court under Rule 6(b).

(4) That opposing counsel cannot waive the strict requirements of the rules fixing the time for filing post trial motions by agreeing to such extensions of time.

(5) That, under the facts before us, ignorance of the rules resulting in an agreement for an unauthorized extension of time for filing post-trial motions does not furnish grounds for relief under Rule 60(b).

We have given careful consideration to plaintiff's contentions but feel compelled to adhere to our holding in *Hulson, supra*, for the reasons and under the authorities therein set out. These need not be restated here. They require an affirmance of the case now before us.

If the rules applicable to the case at bar are too strict or bring about an undesirably harsh result, they should be revised or amended as provided by law and not through the judicial process. We express no opinion here on the desirability of such changes. However, we do point out that the Federal Rules of Civil Procedure are now under study by appropriate committees, and counsel have an opportunity to present their views to such study groups.

The judgment and orders of the district court appealed from are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, November 8, 1961

BEFORE

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

MARGARET NUGENT,
Plaintiff-Appellant,

No. 13329 vs.

YELLOW CAB COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

Federal Rules of Civil Procedure.

RULE 6.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, eff. March 19, 1948.

RULE 59.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits; which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.